

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs January 5, 2010

CLEO PATTERSON v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County

No. P-33579 Chris B. Craft, Judge

No. W2009-01494-CCA-R3-HC - Filed March 5, 2010

The Petitioner, Cleo Patterson, pleaded guilty to shoplifting, first degree burglary, sale of marijuana, and DUI in the Montgomery County Circuit Court. He subsequently filed a pro se petition for writ of habeas corpus in the Shelby County Criminal Court which was summarily dismissed. On appeal, the Petitioner argues that the trial court erred in failing to appoint counsel and in failing to grant an evidentiary hearing. He also contends that he is restrained of liberty because of his aforementioned “void” convictions. Upon review, we affirm the judgment summarily dismissing the petition for writ of habeas corpus.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which ALAN E. GLENN and J.C. MCLIN, JJ., joined.

Cleo Patterson, Pro Se, Memphis, Tennessee

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; William L. Gibbons, District Attorney General; and Alanda H. Dwyer, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Background. According to the judgment forms in the record, the Petitioner committed the offense of sale of marijuana in docket number 25067 on November 25, 1987; the offense of shoplifting in docket number 25344 on November 28, 1987; the offense of first degree burglary in docket number 25066 on December 3, 1987; and the offense of DUI in docket number 25476 on May 8, 1988. The Petitioner subsequently pleaded guilty to the aforementioned offenses in the Montgomery County Circuit Court. He was also charged with a separate burglary offense in docket number 25407. The record shows that in an announcement of proposed settlement filed on October 4, 1988, the State and the defense

proposed to the trial court that the State would enter a nolle prosequi as to the burglary offense in docket number 25407. However, the Petitioner failed to include a judgment form for docket number 25407 with his habeas corpus petition. On December 2, 1988, the Petitioner received 90 days of probation for the shoplifting conviction to be served concurrently with five years of probation for the first degree burglary conviction. He also received one year of probation for the sale of marijuana conviction to be served concurrently with the two days in the local workhouse followed by eleven months and twenty-nine days of probation for the DUI conviction. On January 2, 1990, the Petitioner's probation was revoked on the first degree burglary conviction, and he was ordered to serve five years, minus 122 days of jail credit, in the Tennessee Department of Correction.

Prior to filing the petition for writ of habeas corpus, the Petitioner filed a petition for writ of error coram nobis alleging ineffective assistance of trial counsel and a motion to reopen for post-conviction relief in the Montgomery County Circuit Court, which were both denied. See State v. Cleo Patterson, No. M2006-01692-CCA-R3-CD, 2007 WL 2907968, at *1 (Tenn. Crim. App., at Nashville, Sept. 28, 2007). The petition and motion to reopen concerned the Petitioner's convictions for burglary of a dwelling, sale of less than .5 grams of marijuana, and escape from jail that he received between 1987 and 1999. Id. This court affirmed the trial court's denial of relief pursuant to Rule 20, Rules of the Court of Criminal Appeals, on September 28, 2007. Id.

On January 16, 2009, the Petitioner filed a pro se petition for writ of habeas corpus in the Shelby County Criminal Court claiming that his 1988 judgments were "void," that he was restrained of liberty because of these "void" judgments, and that the trial court erred in failing to appoint counsel and grant an evidentiary hearing. The Petitioner asserts in his petition that he was released on bail for the shoplifting, first degree burglary, and sale of marijuana offenses when he was arrested for the burglary charge in docket number 25407. He further claims that he was released on bail for the burglary charge in docket number 25407 when he was arrested for the DUI offense.¹ In effect, the petitioner argues that the sentences he received were void because the trial court ordered that the shoplifting, the first degree burglary, and the sale of marijuana convictions, all of which were pre-bail offenses, were to be served concurrently, rather than consecutively to his DUI conviction, a post-bond offense. See Tenn. R. Crim. P. 32(c)(3)(C) (requiring mandatory consecutive sentences if "a felony [is] committed while the defendant was released on bail and the defendant is convicted of both offenses"); T.C.A. § 40-20-111(b) (stating that "[i]n any case in which a defendant commits a felony while the defendant was released on bail . . . , and the defendant is convicted of both offenses, the trial judge shall not have discretion as to whether the sentences shall run concurrently or cumulatively, but shall order that the sentences be served

¹The Petitioner failed to attach the bail sheets for his 1988 convictions to his petition for writ of habeas corpus; however, he included these bail sheets in the record on appeal.

cumulatively”); see also McLaney v. Bell, 69 S.W.3d 90, 93-94 (Tenn. 2001) (concluding that a concurrent sentence in contravention of section 40-20-111(b) and Tennessee Rule of Criminal Procedure 32(c)(3) results in an illegal sentence that can be set aside even after it becomes final), overruled on other grounds by Summers v. State, 212 S.W.3d 251, 254 (Tenn. 2007). The Petitioner acknowledges in his petition that he has already served his sentences from his 1988 convictions. However, he claims that he is currently “in custody” for a federal conviction that was enhanced from a 168-month sentence to a 360-month sentence, without parole, because of his “void judgments” from 1988. He also claims that these “void judgments” currently cause “restraints on ‘his movement’ in the Bureau of Prisons . . . regarding custody and security classifications, job and quarters assignments, and the opportunity to be transferred from a medium facility to a low level camp facility and earn minimum wages and good time credits, and prevent[] [him] from being able to transfer to a facility that has the 500[-]hour drug program due to the nature of the void judg[]ments.” Finally, he argues in his petition that he “has placed his ‘Bail Sheet’ judgments before this Honorable Court to establish that his convictions are ‘void judgments[.]’ and thus, request[s] appoint[ment] of counsel and an evidentiary hearing.” The petition for writ of habeas corpus was summarily dismissed by written order on June 22, 2009, wherein the court stated:

[The] petitioner, who is presently an inmate at the Federal Correction Institution in Shelby County[,] Tennessee, complains that several 1988 guilty pleas to [Montgomery] County indictments # 25344, 25066, 25067, 25407[,] and 25476[] that he entered in Clarksville, Tennessee[,] are void, and that because of those convictions on his record his options at the Federal Bureau of Prisons are being limited. There is no question that the sentences for those convictions have long since expired. The court finds that this petition should be dismissed without a hearing as the petitioner is not considered restrained of liberty on these offenses for purposes of the habeas corpus statute. See Hickman v. State, 153 S.W.3d 16, 23-24 (Tenn. 2004).

[W]e hold that a person is not “restrained of liberty” for purposes of the habeas corpus statute unless the challenged judgment itself imposes a restraint upon the petitioner’s freedom of action or movement. Use of the challenged judgment to enhance the sentence imposed on a separate conviction is not a restraint of liberty sufficient to permit a habeas corpus challenge to the original conviction long after the sentence on the original conviction has expired.

Id. at 23.

If this court were to treat this petition as a petition for post-conviction relief, as no appeal was ever taken from these guilty pleas, it plainly appears that the petition has not been filed within the statute of limitations of one year set forth in T.C.A. § 40-30-202, and the petition would also be dismissed.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the above-styled Petition for Writ of Habeas Corpus is hereby dismissed without a hearing as found to be without merit on its face.

The Petitioner filed a timely notice of appeal on July 10, 2009.

ANALYSIS

On appeal, the Petitioner argues that the trial court erred in failing to appoint counsel and in failing to grant him an evidentiary hearing on his petition for writ of habeas corpus. He also contends that he is restrained of liberty because his allegedly “void” convictions for shoplifting, first degree burglary, sale of marijuana, and DUI enhanced the sentence for his federal conviction and limited his privileges at the federal prison where he is currently confined. In response, the State argues that the Petitioner has failed to meet the procedural requirements for habeas corpus relief as stated in Tennessee Code Annotated section 29-21-107. It further contends that the trial court was not required to inquire further regarding the allegations in the petition because the Petitioner failed to state a cognizable claim for relief and failed to meet his burden of proving that he is restrained of liberty by his 1988 convictions. We agree with the State.

In determining whether to grant habeas corpus relief, our review is de novo without a presumption of correctness given to the lower court’s findings. Summers v. State, 212 S.W.3d 251, 255 (Tenn. 2007) (citing State v. Livingston, 197 S.W.3d 710, 712 (Tenn. 2006)). A prisoner is guaranteed the right to habeas corpus relief under Article I, section 15 of the Tennessee Constitution. See also T.C.A. §§ 29-21-101 to -130. The grounds upon which a writ of habeas corpus may be issued, however, are very narrow. Taylor v. State, 995 S.W.2d 78, 83 (Tenn. 1999). “Habeas corpus relief is available in Tennessee only when ‘it appears upon the face of the judgment or the record of the proceedings upon which the judgment is rendered’ that a convicting court was without jurisdiction or authority to sentence a defendant, or that a defendant’s sentence of imprisonment or other restraint has expired.” Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993). “[T]he purpose of a habeas corpus petition is to contest void and not merely voidable judgments.” Potts v. State, 833 S.W.2d 60, 62 (Tenn. 1992) (citing State ex rel. Newsom v. Henderson, 424 S.W.2d 186, 189 (Tenn. 1968)). “A void judgment is one in which the judgment is facially invalid because the court lacked jurisdiction or authority to render the judgment or because the defendant’s sentence has expired.” Taylor, 995 S.W.2d at 83 (citing Dykes v. Compton, 978 S.W.2d 528,

529 (Tenn. 1998); Archer, 851 S.W.2d at 161-64). However, “a voidable judgment ‘is facially valid and requires the introduction of proof beyond the face of the record or judgment to establish its invalidity.’” Hickman v. State, 153 S.W.3d 16, 24 (Tenn. 2004) (citing State v. Ritchie, 20 S.W.3d 624, 630-31 (Tenn. 2000)); see also Summers, 212 S.W.3d at 256 (citing Dykes, 978 S.W.2d at 529). Thus, “[i]n all cases where a petitioner must introduce proof beyond the record to establish the invalidity of his conviction, then that conviction by definition is merely voidable, and a Tennessee court cannot issue the writ of habeas corpus under such circumstances.” Ritchie, 20 S.W.3d at 633 (Tenn. 2000). Moreover, it is the petitioner’s burden to demonstrate, by a preponderance of the evidence, that the judgment is void or that the confinement is illegal. Wyatt v. State, 24 S.W.3d 319, 322 (Tenn. 2000). If this burden is met, the Petitioner is entitled to immediate release. State v. Warren, 740 S.W.2d 427, 428 (Tenn. Crim. App. 1986) (citing Ussery v. Avery, 432 S.W.2d 656, 658 (Tenn. 1968)).

If the habeas corpus court determines from the petitioner’s filings that no cognizable claim has been stated and that the petitioner is not entitled to relief, the petition for writ of habeas corpus may be summarily dismissed. Hickman, 153 S.W.3d at 20. The habeas corpus court may summarily dismiss the petition without the appointment of a lawyer and without an evidentiary hearing if there is nothing on the face of the judgment to indicate that the convictions are void. Passarella v. State, 891 S.W.2d 619, 627 (Tenn. Crim. App. 1994), perm. to appeal denied (Tenn. Nov. 28, 1994), superseded by statute as stated in State v. Steven S. Newman, No. 02C01-9707-CC-00266, 1998 WL 104492, at *1 n.2 (Tenn. Crim. App., at Jackson, Mar. 11, 1998). “The petitioner bears the burden of providing an adequate record for summary review of the habeas corpus petition, including consideration of whether counsel should be appointed.” Summers, 212 S.W.3d at 261.

The State asserts that the Petitioner has failed to meet the procedural requirements as stated for habeas corpus relief in section 29-21-107. These procedural requirements are mandatory and must be scrupulously followed. Id. at 259 (citing Archer, 851 S.W.2d at 165). In addition, section 29-21-107 requires that the petition state:

- (1) That the person in whose behalf the writ is sought, is illegally restrained of liberty, and the person by whom and place where restrained, mentioning the name of such person, if known, and, if unknown, describing the person with as much particularity as practicable;
- (2) The cause or pretense of such restraint according to the best information of the applicant, and if it be by virtue of any legal process, a copy thereof shall be annexed, or a satisfactory reason given for its absence;

(3) That the legality of the restraint has not already been adjudged upon a prior proceeding of the same character, to the best of the applicant's knowledge and belief; and

(4) That it is first application for the writ, or, if a previous application has been made, a copy of the petition and proceedings thereon shall be produced, or satisfactory reasons be given for the failure so to do.

T.C.A. § 29-21-107(b) (2006). A trial court properly may choose to summarily dismiss a petition for failing to comply with the statutory procedural requirements. Id. at 260 (citing Hickman, 153 S.W.3d at 21; State ex rel. Goss v. Heer, 413 S.W.2d 688, 693 (Tenn. 1967); State ex rel. Allen v. Johnson, 394 S.W.2d 652, 653 (Tenn. 1965)).

We initially note that the Petitioner failed to follow the procedural requirement in section 29-21-107(b)(2). Although the Petitioner attached judgment sheets for case numbers 25344, 25066, 25067, 25407, and 25476, he failed to attach the judgment sheet from case number 25407 to his petition for writ of habeas corpus. Instead, the Petitioner attached an "Announcement of Proposed Settlement" regarding case number 25407. In addition, the Petitioner failed to include any information documenting his release on bail for the aforementioned charges, which is essential to his claim that his 1988 convictions are void because the shoplifting and first degree burglary and the sale of marijuana and DUI charges were ordered to be served concurrently rather than consecutively. See Tenn. R. Crim. P. 32(c)(3)(C); T.C.A. § 40-20-111(b). We note that "summary dismissal may be proper when . . . the petitioner fails to attach to the habeas corpus petition pertinent documents from the record of the underlying proceedings to support his factual assertions." Summers, 212 S.W.3d at 254. Moreover, the procedural requirements for habeas corpus relief are mandatory and must be scrupulously followed. Id. at 259 (citing Archer, 851 S.W.2d at 165). The petitioner's failure to attach a copy of the aforementioned judgment and his failure to attach documentation regarding his releases on bail to his petition provide a sufficient basis for the habeas court to summarily dismiss the petition. See Faulkner v. State, 226 S.W.3d 358, 365 (Tenn. 2007). Accordingly, the habeas court's summary dismissal of the petition in this case was proper.

The Petitioner first argues that the habeas court erred when it summarily dismissed his petition without appointing counsel and without ordering an evidentiary hearing. "There is no federal or state constitutional right to counsel in a habeas corpus proceeding." Summers, 212 S.W.3d at 260 (citing Coleman v. Thompson, 501 U.S. 722, 755, 111 S. Ct. 2546 (1991); State ex rel. Hall v. Meadows, 389 S.W.2d 256, 260 (1965)). However, Tennessee Supreme Court Rule 13 provides that an indigent petitioner in a habeas corpus proceeding may have appointed counsel. See Tenn. Sup. Ct. R. 13, § 1(d)(1)(C).

“Appointment of counsel in a state habeas corpus proceeding is within the trial court’s discretion.” Summers, 212 S.W.3d at 260 (citing T.C.A. § 40-14-204). Moreover, Tennessee Code Annotated section 40-14-204 provides that in habeas corpus proceedings the trial court “shall determine the question of indigency and appoint counsel, if necessary, in the manner set out in this part.” However, given that the Petitioner’s allegations are not cognizable claims for habeas corpus relief, the habeas court properly dismissed the petition without appointing counsel and without granting an evidentiary hearing. See Hickman, 153 S.W.3d at 20.

Aside from the procedural defects with the Petitioner’s appeal, we have reviewed the record as submitted and conclude that the petitioner is not entitled to relief. The record shows that the Petitioner was released on bail for the shoplifting, first degree burglary, and sale of marijuana offenses when he was re-arrested for another burglary offense in docket number 25407, which was ultimately dismissed. The petitioner was released on bail for the burglary charge in docket number 25407 when he was re-arrested for the DUI offense. Under our law, there is no illegality in ordering that the pre-bail sentences for shoplifting, first degree burglary, and sale of marijuana be served concurrently rather than consecutively with the post-bail DUI sentence because the DUI offense is a misdemeanor rather than a felony. See Summers, 212 S.W.3d at 262; see also Tenn. R. Crim. P. 32(c)(3)(C) (requiring mandatory consecutive sentences if “a felony [is] committed while the defendant was released on bail and the defendant is convicted of both offenses”); T.C.A. § 40-20-111(b) (stating that “[i]n any case in which a defendant commits a felony while the defendant was released on bail . . . , and the defendant is convicted of both offenses, the trial judge shall not have discretion as to whether the sentences shall run concurrently or cumulatively, but shall order that the sentences be served cumulatively”). Furthermore, the Petitioner has the burden of proving that the allegations in his petition are true. Id. Accordingly, the Petitioner is not entitled to relief.

We conclude that the Petitioner failed to comply with the procedural requirements in section 29-21-107 and was not entitled to appointment of counsel or an evidentiary hearing. We further conclude that the court properly denied habeas corpus relief. Accordingly, the Petitioner is not entitled to relief.

CONCLUSION

_____ The habeas corpus court’s summary dismissal of the petition for a writ of habeas corpus was proper.

CAMILLE R. McMULLEN, JUDGE